IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment requires that a search warrant be obtained to seize the clothing of a person arrested on probable cause where such seizure takes place ten hours after the arrest, where no probable cause existed to seize the clothing at the time of arrest and confinement and where the purpose of the seizure is to submit the clothing to laboratory analysis in an effort to discover evidence of a crime.

COUNTER-STATEMENT

Respondent William Livesay died November 26, 1973 at Dayton, Ohio. A certified copy of the death certificate is furnished herewith.

In May 1970, the Lebanon, Ohio post office was equipped with a sound activated silent alarm system which, when triggered, set off an alarm in the home of a private citizen who then informed the Lebanon police department by telephone of the activation (R. 210, 212, 308, 309).

At about 11:00 P. M. on May 30, 1970, patrolman Thomas Ashley of the Lebanon police department, while on routine patrol, exited from a driveway immediately south of the post office onto South Broadway (R. 154). As he did so, he saw to his left the respondent Edwards and a companion on the west sidewalk of Broadway at a point approximately even with the eastward extension of the north line of the post office (R. 154, 155). The men were walking northwardly in a normal and unsuspicious manner (R. 158). Upon reaching the intersection of Broadway and Main Streets (approximately half a block north of the post office), they crossed Main Street and turned west on its north sidewalk (R. 158-160).

When Edwards had reached a point approximately half a block west of the intersection, Ashley received a general radio transmission advising that the post office alarm had been activated (R. 160, 161). He immediately apprehended Edwards and his companion (R. 162-164), placed them in his cruiser and returned to the post office from where they were shortly transported to the local jail (A. 13, 18, 28, 32).

As the Statement of the government indicates, police investigation at the post office subsequent to the arrest revealed that an apparent attempt had been made to enter the building through a first floor window.

After the opening of retail stores on the following morning, substitute clothing was purchased for Edwards and his clothing taken from him. Analysis of paint chips

found in his clothing showed them to be substantially similar to paint chips from the vicinity of the damaged post office window.

For the purposes of this appeal we submit that the significant facts are:

1. When patrolman Ashley arrested Edwards he did not know that in fact a crime had been committed, much less the manner or method of it. (Five of the prior six activations of the alarm system had been caused by thunder storms, slamming doors and the like [R. 321]).

2. At the time Edwards was placed in jail and the incarceration process completed, the Lebanon police did not know that access to the post office had been attempted through the window from which paint samples were ultimately obtained.

3. A minimum of ten hours elapsed from Edwards' arrest to the seizure of his clothing.

SUMMARY OF ARGUMENT

This Court has never held or suggested that the rather simple and direct language of the Warrant Clause has no application to the person or effects of a citizen in police custody other than in narrowly circumscribed and carefully delineated circumstances, i.e. searches incident to arrest and searches made under exigent circumstances. The search here in question does not qualify under standards heretofore pronounced by this Court for inclusion in either of the above exceptions to the warrant rule and therefore under existing authority must fail.

Nor is there anything in the legislative history of the Fourth Amendment or in its interpretations by this Court to justify in principle or in practice the substantial reduction in a citizen's rights to privacy and property that the government here advocates.

ARGUMENT

THE FOURTH AMENDMENT REQUIRES THAT A WARRANT BE OBTAINED TO SEIZE AND SEARCH THE CLOTHING OF A CITIZEN LAWFULLY IN CUSTODY WHERE THE SEARCH IS NEITHER INCIDENT TO ARREST NOR MADE UNDER EXIGENT CIRCUMSTANCES.

It is clear that warrantless searches are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.[1] Because the government apparently recognizes that the instant search does not come within either of the aforesaid exceptions to the warrant rule, it asks this Court to create out of whole cloth another exception to the rule. It is well, nonetheless, to examine the instant facts against the standard of existing authority.

A. The Search Herein Questioned Was Not Conducted Incident to Arrest.

No citation is required for the propriety of warrantless searches incident to arrest. What is significant here, however, is that this Court has uniformly interpreted "incident to arrest" to mean "substantially contemporaneous with arrest".[2]

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[1] Terry v. Ohio 392 U.S. 1; Katz v. United States 389 U.S. 347; Warden v. Hayden 387 U.S. 294; Preston v. United States 376 U.S. 364; Coolidge v. New Hampshire 403 U.S. 443; Chimel v. California 395 U.S. 752; McDonald v. United States 335 U.S. 451; Agnello v. United States 269 U.S. 20.

[2] Agnello v. U.S. 269 U.S. 20; Stoner v. California 376 U.S. 483; James v. Louisiana 382 U.S. 36.

Because the reason for the incident to arrest exception to the warrant rule is rooted in society's interest in protecting the arresting officer from weapons concealed on the person of the arrestee and in preventing the destruction or concealment of evidence or contraband, it can plainly have no application here.

Respondent was arrested at 11:00 P. M., presumably searched for weapons, placed in a police vehicle, transported to the county jail and put alone in a cell. Assuming that retail stores open at 9:00 A. M. and assuming further that the substitute clothing was purchased immediately thereafter, an absolute minimum of ten hours elapsed between arrest and the seizure of clothing during almost all of which time respondent was alone in a jail cell.

A review of the cases cited by the government on this issue, particularly those contained in Footnote 9, reveals that in each instance the facts of those cases brought them within the incident to arrest exception (none approached a ten hour time differential) and, more significantly, that the courts decided them in the context of the incident to arrest exception. None suggested the blanket dispensation from the warrant requirement urged by the government.

Circuit Courts of Appeal have had no apparent difficulty in applying the incident to arrest standards as announced by this Court. In United States v. Williams, 416 F.2d 4 C.A. 5 (1969), the court approved the seizure of clothing two and one half hours after arrest when the seizure took place as part of the initial interrogation and booking process as a search incident to arrest. The same court in the same year condemned the warrantless search of clothing three days after arrest as not meeting the substantially contemporaneous test. Brett v. United States, 412 F.2d 401 C.A. 5 (1969).

Additionally, the instant search was not aimed at preserving evidence or preventing its destruction. As the government concedes in its brief, neither respondent nor police could have been aware of the presence of paint chips because of their microscopic size. This was an investigative search to determine if the evidence existed at all.

For the foregoing reasons we submit that the instant search was not a search incident to arrest.

II. The Search Here in Question Was Not Made Under Exigent Circumstances Excusing the Obtaining of a Warrant.

The most commonly recognized "exigent circumstances" exceptions to the warrant rule have been in the areas of hot pursuit and automobiles capable of movement. *Warden v. Hayden*, 387 U.S. 294 (1961); *Carroll v. United States*, 267 U.S. 132 (1925).

The government argues analogously, citing *Carroll* and *Chambers v. Maroney*, 399 U.S. 42, that if there is probable cause to search an automobile when it is stopped on the highway (*Carroll*) and if it is not unreasonable to move it to another place and there search it (*Chambers*), it is similarly not unreasonable to search the clothing of an arrested citizen at the police station if there was probable cause to search the clothing at the time and scene of arrest.

We recognize and admire the legal logic of that argument but the instant facts destroy utterly its application here. The validity of the argument is premised on the existence of probable cause to search the car or clothing at the time of arrest. Such probable cause simply did not exist at the time of Edwards' arrest and subsequent incarceration. The only facts available to

Patrolman Ashley at the time he arrested Edwards were that the alarm had been activated at the post office and that Edwards had been on the sidewalk at the post office a relatively short time prior to Ashley's being advised of the alarm's activation. He had absolutely no information how access had been attempted or, in fact, if it had been attempted at all. Much less did he know anything about mesh screens or paint chips. It is conceded in the government's Statement that the investigation that revealed the attempt to enter through the window was not made until sometime after Edwards was arrested and jailed.

Absent probable cause to do so, patrolman Ashley could not have separated respondent from his clothing at the arrest scene and if he couldn't do it there, he couldn't do it at the police station immediately upon arriving there.

When, at a later hour, sufficient facts came to the knowledge of the police to justify a seizure of respondent's clothing, there were no longer exigent circumstances existing to excuse the obtaining of a warrant.

C. To Reverse the Decision Below Would Not Only Seriously Diminish Fourth Amendment Values But Would Do So With No Compensating Benefit to Effective Law Enforcement.

This Court's most recent and thorough review in *United States v. Robinson*, No. 72-936 decided December 11, 1973 of the variations on the Fourth Amendment theme from *Boyd* and *Weeks* through *Agnello*, *Marron*, *Lefkowitz*, *Harris*, *Trupiano*, *Rabinowitz* and ultimately to *Chimel*[3] (with respect to the permissible area of search

[3] *Agnello v. U.S.*, 269 U.S. 20; *Weeks v. United States* 232 U.S. 383; *Boyd v. United States* 116 U.S. 616; *United States v.*

beyond the body of the arrestee) and *Robinson*, *supra*, (with respect to the kind of search that may be made of the arrestee's body) make a similar review here unnecessary.

Suffice it to say that we espouse and urge upon the Court the historical and philosophical concepts of the Fourth Amendment expressed by Justice Frankfurter in his dissent in *Rabinowitz* in large part adopted by this Court in *Chimel*. What Justice Frankfurter so bitterly opposed is precisely what the government urges here. As he said at page 79, 80:

> ". . . The right to search an arrested person and to take the stuff on top of the desk at which he sits has a justification of necessity which does not eat away the great principle of the Fourth Amendment. But to assume that this exception of a search incidental to arrest permits a freehanded search without warrant is to subvert the purpose of the Fourth Amendment by making the exception displace the principle. History and the policy which it represents alike admonish against it. . . .
>
> "To tear 'unreasonable' from the context and history and purpose of the Fourth Amendment in applying the narrow exception of search as an incident to an arrest is to disregard *the* reason to which reference must be made when a question arises under the Fourth Amendment. It is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest. The test by which searches and seizures must

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Lefkowitz 285 U.S. 452; Trupiano v. United States 331 U.S. 145; United States v. Rabinowitz 339 U.S. 56; Chimel v. California 395 U.S. 752; Marron v. United States 275 U.S. 192; Harris v. United States 331 U.S. 145

be judged is whether conduct is consonant with the main aim of the Fourth Amendment. The main aim of the Fourth Amendment is against invasion of the right of privacy as to one's effects and papers without regard to the result of such invasion. The purpose of the Fourth Amendment was to assure that the existence of probable cause as the legal basis for making a search was to be determined by a judicial officer before arrest and not after, subject only to what is necessarily to be excepted from such requirement. The exceptions cannot be enthroned into the rule. The justification for intrusion into a man's privacy was to be determined by a magistrate uninfluenced by what may turn out to be a successful search for papers, the desire to search for which might be the very reason for the Fourth Amendment's prohibition. The framers did not regard judicial authorization as a formal requirement for a piece of paper. They deemed a man's belongings part of his personality and his life."

In *Chimel*, this Court decided that it was unreasonable to search a man's house simply because he is arrested in it. We submit that it is no less unreasonable to strip him of his clothing simply because he is arrested in them.

The government suggests that the only standard by which post arrest, probable cause searches ought be judged is that of reasonableness. We suggest that the adoption of that position may well create more problems than it would solve. If a citizen is arrested three days after an alleged offence, may whatever clothing he happens to be wearing at the time be subjected to the same treatment as respondent's? Is there any time period whatever within which such a search must be conducted? What if the process to which the clothing is to be submitted may damage or destroy it?

Ultimately of course the issue is who will pass upon the mixed questions of reasonableness and probable cause. Is the balance between a citizen's property rights and his clothing and society's interest in obtaining evidence to be determined by the police officer in charge of the investigation or is it to be determined by a disinterested magistrate? As this Court said in *McDonald v. United States*, 335 U.S. 451, 455:

> "... We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

Effective law enforcement could in no way have been benefited by a dispensation from the warrant requirement in the instant case. As we have pointed out previously, neither the police nor respondent were aware of paint chips in respondent's clothing. The police did, in fact, obtain a warrant on the following morning for the

search of the automobile in which the deceased respondent Livesay was arrested and there is no apparent reason why they could not at the same time have obtained a warrant for respondent's clothing.

We submit that in *Chimel* and in *Robinson* this Court has fixed reasonable and ascertainable limits to searches incident to arrest which adequately protect the rights of citizens and which adequately serve the legitimate interests of society. To do other than affirm the decision below would be to unreasonably diminish the first of those considerations without materially enhancing the second.

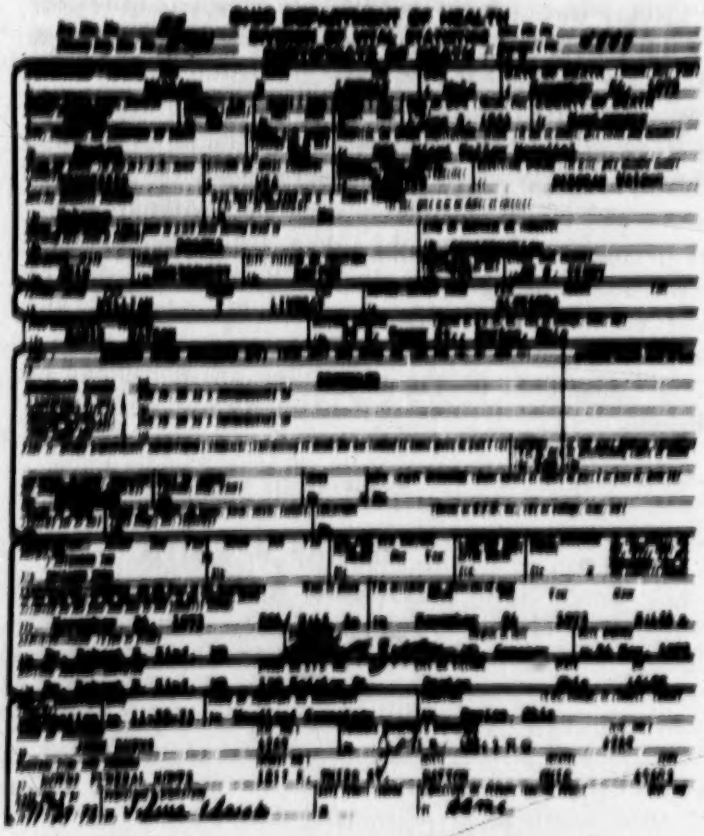
The judgments of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS R. SMITH
Attorney for Respondent

December 1973.

APPENDIX



I HEREBY CERTIFY THE ABOVE TO BE A TRUE AND CORRECT PHOTOGRAPHIC REPRODUCTION OF THE CERTIFICATE ON FILE IN THE OFFICE OF THE HERKIMER COUNTY GENERAL HEALTH DISTRICT, HERKIMER, OHIO.

Dec 19, 1973

DATE

2H

State of Ohio ss | **AFFIDAVIT** | Registrar's No. [illegible]
County of Montgomery | **CORRECTION OF DEATH CERTIFICATE** | File No.

INFORMATION AS IT APPEARS ON ORIGINAL CERTIFICATE OF DEATH

Name as recorded William [illegible] Livesay

Date of death Nov. [illegible], 1973 Place of death Dayton (City or Village) Montgomery County

ITEMS TO BE CORRECTED OR ADDED

Item		Reads as		Should read	
Item	Date of Cremation	Reads as	November [illegible], 1973	Should read	December [illegible], 1973
Item		Reads as		Should read	
Item		Reads as		Should read	
Item		Reads as		Should read	
Item		Reads as		Should read	

PERSON SWEARING TO THE ABOVE FACTS

I, Dale H. McComb, being first duly sworn say that I have personal knowledge and the foregoing facts are true and correct.

Signature [signature] December [illegible], 1973

Signature of NOTARY PUBLIC [signature] My commission expires NOV. [illegible], [illegible]